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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., *et al.*,

Petitioners,

v.

ROBERT O. McDONNELL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR AMICUS CURIAE THE NATIONAL PRISON PROJECT

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BRIEF FOR AMICUS CURIAE THE NATIONAL PRISON PROJECT

INTEREST OF AMICUS CURIAE

The National Prison Project of the American Civil Liberties Foundation, Inc., is a non-profit, tax-exempt New York corporation, engaged in efforts, through staff attorneys and other employees, to develop rehabilitative and other programs and facilities, devise model prison procedures and regulations, and otherwise to improve prison conditions in the United States.

In furtherance of the activities described above, the Project's staff attorneys and other employees are engaged in the counseling and representation of prisoners incarcerated in penal institutions throughout the country. The Project has been involved in many important cases with issues similar to those in the case at bar. Eg. *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971); *Sostre v. McGinnis*, 442 F.2d 198 (2d Cir. 1971); *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md., 1972); *Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va., 1971); *Nieves v. Oswald*, 477 F.2d 1109 (2d Cir. 1973); *Adams v. Carlson*, 368 F. Supp. 1050 (E.D. Ill., 1973).

SUMMARY OF ARGUMENT

The only issue before this Court with which this brief is concerned is what process, if any, is due prisoners faced with accusations of serious misconduct and subject to potentially severe punishment. *Amicus Curiae* National Prison Project contends that such prisoners are entitled to the "minimum requirements of due process," *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), and that the opinion of the lower court ought to be affirmed.

Severe prison punishment can directly and indirectly compromise the most fundamental prisoner interest there is – the interest in personal liberty and freedom from incarceration. Substantial prison punishment can also abridge other prisoner interests that are of critical importance including the ability of prisoners to enjoy the basic entitlements of prison life and participate in programs of rehabilitation. These important interests are entitled to recognition as being "within the contemplation of the 'liberty' or 'property' language of the Fourteenth Amendment," *Morrissey v. Brewer, supra*, at 481. Prisoners enjoying these

interests are entitled to the protection from arbitrary revocation and abridgment of these interests provided by the "minimum requirements of due process."

No legitimate state interest dictates that any of these "minimum requirements" be abrogated. Indeed, it is in the interest of the state to assure that prisoners facing severe punishment are provided with these procedural requirements in order that the potential for prisoners' rehabilitation be maximized. The flexible nature of procedural due process allows legitimate state interests to be protected without sacrificing these procedural protections which are essential to accurate fact-finding. These protections include the right to written notice of charges and disclosure of the basis of accusations of misconduct, the opportunity to be heard in person and to present witnesses, the right to confront and cross-examine adverse witnesses, the right to representation by retained counsel or counsel-substitute and, in certain limited instances, to appointed counsel, and the right to a written decision by an impartial hearing tribunal.

ARGUMENT

THE DUE PROCESS CLAUSE REQUIRES THE PROVISION OF A PROCEDURALLY FAIR ADMINISTRATIVE HEARING TO PRISONERS CHARGED WITH MISCONDUCT AND FACING POTENTIALLY SEVERE PUNISHMENT.

This Court has held that a hearing is necessary before the government may act in a way injurious to private interests if "the nature of the interest [jeopardized by governmental action] is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). If the interest is found to be constitutionally protected, the analysis of the scope and content of the process due before that interest may be compromised "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

The threshold inquiry, therefore, is twofold: what interest of prisoners is compromised by governmental decision-making and is this interest entitled to constitutional protection.

A. Prison punishment can constitute severe and grievous loss.

Although the existence of liberty is viewed by many as determined by the inflexible dichotomy that one is free when not imprisoned and one is not free when imprisoned, it is clear that gradations of institutional freedom exist both within a single institution and among several institutions.

Institutional freedom in most prison systems reaches its nadir within the confines of maximum security prisons and is at its zenith at minimum security centers, which usually are marked by a reduction in security devices and practices.[1]

Within the same prison there are separate quarters where prisoners are accorded different degrees of liberty. These levels of custody generally range from solitary confinement, the most restrictive form of imprisonment, through confinement in stratified levels of punitive segregation to confinement

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[1] Maximum security institutions . . . may be viewed as those facilities characterized by high perimeter security, high internal security, and operating regulations that curtail movement and maximize control . . . .

Today medium security institutions probably embody most of the ideals and characteristics of the eary attempts to reform offenders. It is in these facilities that the most intensive correctional or rehabilitation efforts are conducted. Here inmates are exposed to a variety of programs intended to help them become useful members of society. But the predominant consideration still is security . . . .

[Minimum security institutions] are relatively open, and consequently custody is a function of classification rather than of prison hardware . . . . [They] range from large drug rehabilitation centers to small farm, road and forestry camps located throughout rural America.

National Advisory Commission on Criminal Justice Standards and Goals, *Report on Corrections*, 343-345 (1973). (Hereinafter, *Advisory Commission Report*-1973). *See also, Task Force on Corrections, The President's Commission on Law Enforcement and Administration of Justice* (1967) (Hereinafter, *President's Commission Report*-1967); Tappan, *Crime, Justice and Correction*, 701-703 (1960); Sykes, *The Society of Captives* (1958).

in the "general population," the most common type of custody.[2]

The existence or absence of various privileges or rights hinges upon the security status of the institution in which a prisoner is confined and his level of custody within that institution. Vocational, work release and other rehabilitative programs tend to be reserved for prisoners in minimum security institutions.[3] The opportunity for parole increases as a prisoner progresses through the chain of maximum-medium-minimum prison security.[4] While prison officials' concern with regard to a maximum security prisoner relate

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[2] The term solitary confinement is used to describe a punitive custody status that has been variously described as isolation, segregation, punitive segregation or solitary confinement. *See*, The American Correctional Association, *Manual of Correctional Standards*, 411-416 (3rd ed. 1966).

For a description of the harsh conditions of confinement in the solitary cells of some prisons, *see*, *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); *Knuckles v. Prasse*, 302 F. Supp. 1036, 1061-62 (E.D. Pa., 1969), *aff'd.*, 435 F.2d 1255 (3rd Cir. 1971), *cert. den.*, 403 U.S. 936, *reh. den.*, 404 U.S. 877 (1971); *Aikens, et al. v. Lash, et al.*, Civil Action No. 72 S 129 (N.D. Ind., January 23, 1974); *Hancock v. Avery*, 301 F. Supp. 786 (M.D. Tenn., 1969); *Jordon v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal., 1966).

A multi-level stratification scheme for punitive isolation is described in *Meyers v. Alldredge*, 348 F. Supp. 807 (M.D. Pa., 1972).

[3] *See* n. 1, *supra*.

[4] The information available to the parole board at the time of a hearing typically is prepared by the institution staff, usually a caseworker. The caseworker, in turn, relies almost totally on reports on the offender's adjustment to prison life and progress in moving from maximum to minimum custody status. *Advisory Commission Report* (1973) at 400. *See also*, 28 C.F.R. §2.24; Glaser, *The Effectiveness of a Prison and Parole System* (1964); *National Parole Institutes, Selection for Parole*, (New York: National Council on Crime and Delinquency, 1966).

primarily to maintaing security, their concerns with regard to a minimum security prisoner emphasize preparation for his return to the outside world.[5]

In addition to controlling the extent of a prisoner's liberty by determining the institution in which he is imprisoned and his level of custody within that institution, prison officials also control the length of a prisoner's sentence by granting, denying, or revoking accrued credit for time served (Hereinafter "good time").[6]

Severe prison punishment can, therefore, directly and indirectly compromise the most fundamental and basic prisoner interest there is – the prisoner's interest in personal liberty and freedom from incarceration. Denial or revocation of "good time" directly extends the length of a prisoner's period of incarceration, often for months or even years.[7] In addition, the revocation of "good time"

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[5] *See* n. 1, *supra.*

[6] "Good time" is credited against a prisoner's total sentence; its purpose is to reward good behavior and hence, provide an incentive to rehabilitation. Generally mandated by statute, it is common to allow the reduction of a sentence by five to ten days for each month served without a record of misbehavior. Hence, a prisoner's sentence may be reduced by as much as one-fourth or one-third, if he maintains a good record while in prison.

All states except Hawaii, Kansas, Louisiana and Utah, have statutes providing for good time credit for good behavior. The federal good time statute is found at 18 U.S.C. §4161 (1964). *See* Jacob, "Prison Discipline and Inmate Rights," 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 227, 231, n.'s 17, 18 (1971).

[7] In *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir., 1973) *reh. den.* 1973, a prisoner lost twenty-one months of good time postponing his release almost two years. *See also, Kritsky v. McGinnis*, 313 F. Supp. 1247 (N.D.N.Y. 1970) (eighteen months of good behavior time credits forfeited).

(continued)

immediately and automatically *forfeits* the right of some prisoners to be considered for parole[8] and, for others, seriously jeopardizes the possibility for positive parole consideration.[9]

Prison punishment can abridge other prisoner interests that are also of critical importance. The confinement of prisoners in solitary or punitive segregation cells, a

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[7] (continued) The cancellation of such credits thus inflicts the same kind of "grievous loss" on the prisoner as does the revocation of parole. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Cf. *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (Imprisonment for even one day is a constitutionally significant denial of liberty); *Sands v. Wainwright*, 357 F. Supp. 1062, 1082 (M.D. Fla., 1973), remanded for rehearing on procedural grounds, 14 Cr. L. Reptr. 2538 (5th Cir. Dec. 26, 1973).

[8] 28 C.F.R. §2.12(A) states in part:

> Any forfeiture of statutory good time shall be deemed to indicate that the prisoner has violated the rules of the institution to a serious degree, and a *parole will not be granted* in any case in which a forfeiture remains effective against the prisoner concerned. [Emphasis supplied].

[9] In the vast majority of jurisdictions, prisoners receive good time as a matter of right if they conform to prison regulations. *United States ex rel. Miller v. Twomey*, *supra*, n. 7, at 714, n. 28; Jacob, *supra*, n. 6, at 231. Good conduct (and the consequential accumulation of "good time") is generally found to be the most important item considered by parole board members. *Presidents Commission, Report-1967*, *supra*, n. 1, at 393-394. Thus, the fact that a prisoner's parole report reflects misconduct serious enough to warrant forfeiture of good time, substantially affects the parole board's "judgment as to his potential for living a law-abiding life in the community." *United States ex rel. Miller v. Twomey*, *supra*, n. 7, at 714, n. 27.

punishment which can last for months or even years,[10] inevitably results in the inability of confined prisoners to qualify for or participate in the programs of rehabilitation available in the prison[11] and to enjoy the most basic entitlements of prison life.[12] Punishment

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[10] Bryant v. Harris, 465 F.2d 365 (7th Cir. 1972); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), cert. den., sub. nom., Oswald v. Sostre, 404 U.S. 1049 (1972); Adams v. Carlson, 368 F. Supp. 1050 (E.D. Ill., 1973); Landman v. Royster, 333 F. Supp. 621 (E.D. Va., 1971); Knuckles v. Prasse, *supra*, n. 2.

[11] Walker v. Hughes, No. 39765 (E.D. Mich., January 24, 1974) (Appendix A); California, *Report of the Assembly Select Committee on Prison Reform and Rehabilitation, Administrative Segregation in California Prisons* (Hereinafter *California Report*), Recommendations 4-6 (September 1973).

[12] La Reau v. MacDougall, 473 F.2d 974 (2d Cir. 1972); Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Wright v. McMann, *supra*, n. 2; Adams v. Carlson, *supra*, n. 10; Knuckles v. Prasse, *supra*, n. 2; Hancock v. Avery, *supra*, n. 2; Jordon v. Fitzharris, *supra*, n. 2. See also, *California Report*, *supra*, n. 11, Recommendations 7-13.

In 1951, Barnes and Teeters said in *New Horizons in Criminology* (2d ed. 1961) at 425, "[r]esorting to [solitary confinement] for long periods of time is an excellent illustration of the total lack of imagination and an outmoded type of prison administration all too current in most of our prisons." This comment recognized a reality that has existed for years. In 1867, Charles Dickens visited an American penitentiary and commented:

> In the outskirts, stands a great prison called the Eastern Penitentiary, conducted on a plan peculiar to the State of Pennsylvania. The system here is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong. In its intentions, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this

(continued)

of this nature can also be the premise for parole denial.[13]

The interests of prisoners at issue when severe prison punishment is possible are, therefore, of great magnitude, requiring protection. The forfeiture of "good time," whether it is viewed as traditional or qualified freedom, is indistinguishable[14] from revoked parole, *Morrissey v. Brewer, supra,* and the denial of the opportunity to participate in programs of rehabilitation is a withdrawal of the most important benefit of prison life.[15]

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12 (continued)

> system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what they are doing. . . . I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body; and because its ghastly signs are not so palpable to the eye . . . and it extorts few cries that human ears can hear; therefore, I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.
>
> C. Dickens, *Pictures from Italy and American Notes* at 283 (1867).

13 *See* n. 9, *supra.*

14 Prisoners released from prison before their scheduled release date because they have been credited with "good time" are in most jurisdictions, *see, e.g.,* 18 U.S.C. §4164, treated exactly as if they were on parole. In jurisdictions where the earning of "good time" results in expedited release without continuing supervision "good time" liberty would be absolute.

15 Penologists in the United States today are generally agreed that the prison serves most effectively for the protection of society against crime when its major emphasis is on rehabilitation. They accept this as a fact that no longer needs to be debated. The

(continued)

B. The traditional and rudimentary elements of procedural due process defined in *Morrissey v. Brewer* and *Gagnon v. Scarpelli* are applicable to prison disciplinary proceedings threatening severe punishment.

The Petitioners and *Amicus Curiae* in support of Petitioners ignore not only the very substantial interest of prisoners, but also the flexible nature of due process in arguing that the general elements of due process spelled out by this Court in *Morrissey v. Brewer, supra,* and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) are inapplicable to prison disciplinary proceedings threatening severe punishment.

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15 (continued)
best thought in what was once called the penal field and is now significantly called the correctional field is directed toward developing institutional plants, personnel and programs that will accomplish the rehabilitation of as many offenders as possible and will enable those who cannot be released to adjust as well as possible to the restricted life of the prison. Although prison administrators know that a substantial percentage of adult offenders are not likely to be salvaged by any methods we have thus far developed, they direct their programs of rehabilitation to the presumably incorrigible as well as the probably reclaimable group, and consider only a small minority of prisoners as completely hopeless cases. This may seem to be an impractical and visionary viewpoint, but it is wholly realistic and is based on a clear-cut idea of what rehabilitation is and what it can accomplish. American Correctional Association, *A Manual of Correctional Standards,* 10 (3rd ed. 1966). *See President's Commission Report* (1967) at 6; *McGinnis v. Royster,* 410 U.S. 263, 93 S.Ct. 1055, 1063 (1973); *Walker v. Hughes, supra,* n. 11 (Appendix A).

None of the elements[16] of *Morrissey* or *Gagnon* are inconsistent with legitimate state interests. Indeed, the state has an affirmative interest in guaranteeing that inmates are treated fairly, an interest that can only be realized by adhering to basic due process precepts.

1. The elements of procedural due process are not inconsistent with legitimate state interests.

The Petitioners and *Amicus Curiae* in support of Petitioners, advance several justifications for eliminating one or more of the *Morrissey-Gagnon* rudiments of due process from a prison disciplinary proceeding threatening severe punishment. These justifications include the needs for broad discretion,[17] prompt decision-making,[18] maintenance of security,[19] and avoidance of administrative burdens.[20] It is also argued that the unique nature of a prison

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16 The "elements" of procedural due process which *Amicus Curiae* National Prison Project contends should be made available to prisoners facing potentially severe punishment include the "minimum requirements of due process" described by the court in *Morrissey v. Brewer, supra,* n. 7, at 489, and the right to the representation of counsel under the conditions stated in *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). *See infra,* at 27. It is *not* contended that Morrissey's "two-stage" hearing procedure is necessary.

17 *See generally,* Briefs of Petitioners and *Amicus Curiae,* State of California.

18 *See,* Brief of *Amicus Curiae,* State of California at 10.

19 *See generally,* Brief of Petitioners at 33, 34; Brief of *Amicus Curiae,* State of California at 10, 11.

20 *See generally,* Brief of Petitioners at 28, 29, 72; Brief of *Amicus Curiae,* State of California at 8, 9.

environment[21] supports the abrogation of traditionally accepted procedural rights. None of these asserted justifications, nor any other,[22] counsel against a *Morrissey-Gagnon* hearing requirement in those instances where prisoners face potentially severe punishment.

The necessity for investing prison officials with discretion in maintaining a corrections system is obvious. The complexities of supervising a large group of persons confined within a very limited area and the experience of correctional officials in performing this task support this investment of discretion. But, even if a prison system is

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21 *See*, Brief of *Amicus Curiae*, State of California at 6-8.

22 The Second Circuit in *Sostre v. McGinnis, supra*, n. 10 reversed a lower court opinion requiring basic elements of due process prior to the imposition of serious punishment, *see Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y., 1970), on the grounds, *inter alia*, that prison disciplinary hearings, unlike administrative decisions to terminate welfare and evict tenants from public housing, are not adversary proceedings and do not deal with difficult questions of fact. *Sostre v. McGinnis, supra*, n. 10, at 196-197.

These asserted bases for summary decision-making are, it is respectfully contended, unpersuasive. *Morrissey v. Brewer, supra*, n. 7, rejects the position that labelling a proceeding "non-adversarial" solves due process problems where liberty or other important interests are at stake. The issue before prison disciplinary tribunals is: did the prisoner do what he is alleged to have done, and if so, is it a violation of prison rules? In thus applying general prison policies – "law" – to a given set of facts to determine guilt, the disciplinary panel is performing a quasi-adjudicatory function. It is anomalous to regard this quasi-adjudicatory proceeding as "non-adversarial" while concluding that proceedings which may terminate welfare payments or evict tenants from public housing are adversarial and therefore demand, in the latter cases, the complete observance of normal due process principles. *See, Goldberg v. Kelly*, 397 U.S. 254 (1970); *Escalera v. New York City Housing Authority*, 425 F. 2d 853 (2d Cir., 1970); *Caulder v. Durham Housing Authority*, 433

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carefully controlled by qualified administrators, unlimited discretion is inappropriate because no other administrative system exercises such centralized and complete power over the lives and destinies of men.[23] This grant of power should carry with it the requirement of strict review regardless of the asserted wisdom and experience of administrators. "Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties . . . [a] mistrust that does not depend on an assumption of inveterate venality or incompetence on the part of men in power . . . ." *Covington v. Harris*, 419 F.2d 617, 621 (D.C. Cir., 1969).

Furthermore, trained and experienced prison administrators often exist only at the tip of the correctional "iceberg." The lower echelon correctional officers responsible

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[22] (continued) F.2d 998 (4th Cir., 1970), *cert. den., Housing Authority of City of Durham, N.C. v. Caulder*, 401 U.S. 1003 (1971).

[23] Justice Stewart, speaking for the majority of this Court in *Preiser v. Rodriquez*, 411 U.S. 475 (1973) noted the extensive supervision exercised by prison officials over all details of a prisoner's life. "The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a state and a private citizen . . . . What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the state." *Id.* at 492.

Another judge graphically described the total power prison officials have over the lives of inmates, stating: "[T]he most striking aspect of prison, in terms of Fourteenth Amendment litigation, is that prison is a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings, (except perhaps in the realm of the spirit, and inevitably there as

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for policy implementation and day-to-day decision-making are almost always underpaid, understaffed, or inadequately trained. *See, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections* 6 (1967). (Hereinafter *President's Commission-Report* [1967]). Recent decisions are replete with example of the substantial extent to which custodial officers, sometimes in conjunction with prisoners, assume and exercise the responsibility for all significant decision-making within a prison. *See, e.g., Holt v. Sarver,* 309 F. Supp. 362 (E.D. Ark., 1970), *aff'd.,* 442 F.2d 304 (8th Cir., 1971); *Gates v. Collier,* 349 F. Supp. 881 (N.D. Miss., 1972); *Landman v. Royster,* 333 F. Supp. 621 (E.D. Va., 1971); *Collins v. Schoonfield,* 344 F. Supp. 257 (D. Md., 1972). The decisions also reveal the abuses of discretion and denial of basic prisoner rights which inevitably follow from insulated and unreviewed decision-making.

A finding of prisoner misconduct is, in this case, the premise for the exercise of discretion. It is this factual finding, which is not an exercise of discretion, that requires observance of procedural protections. As in the case of parole revocation, "a simple factual hearing will

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[23] (continued) well) from sundown to sundown, sleeping, walking, speaking, silent, working, playing, viewing, eating, voiding, alone, with others. It is not so, with members of the general adult population. State governments have not undertaken to require members of the general adult population to rise at a certain hour, retire at a certain hour, eat at certain hours, live for periods with no companionship whatever, wear certain clothing, or submit to oral and anal searches after visiting hours, nor have state governments undertaken to prohibit members of the general adult population from speaking to one another, wearing beards, embracing their spouses, or corresponding with their lovers." *Morales v. Schmidt,* 340 F. Supp. 544, 550 (W.D. Wis., 1972), rev'd, 2 Prison L. Rep. 154 (7th Cir., 1973).

not interfere with the exercise of discretion." *Morrissey v. Brewer, supra,* at 483.

Prompt decision-making, concededly a legitimate state interest in certain circumstances,[24] is not jeopardized by a procedurally fair hearing since it is not contended that a *Morrissey*-type hearing must precede separation of a troublesome prisoner from the general prison population or that such a hearing is constitutionally mandated in all or even most instances of alleged prisoner misconduct.[25] Lower courts, in fashioning flexible hearing systems in this context, have only required the observance of the *Morrissey-Gagnon* rudiments of due process, or a facsimile thereof, where severe punishment[26] is threatened and the substantial prisoner interest dictates these protections. *See,*

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[24] Prison officials may clearly have to move quickly in cases of group disturbances or riot or where an individual prisoner is creating an immediate danger of the safety of himself or others. Separation of prisoners from the general population and confinement of prisoners in isolated cells may have to precede a hearing in these instances. No justification is apparent, however, for failure to provide prisoners with a hearing *prior* to revocation or forfeiture of "good time."

[25] Lower courts have required the "minimum requirements of due process", *Morrissey v. Brewer, supra,* n. 7 at 489, only where severe punishment is possible. *See, e.g., Landman v. Royster, supra,* n. 10, (requiring a *Morrissey*-type hearing when "good time" may be revoked, solitary or maximum confinement imposed or padlock confinement imposed for more than 10 days); *Sands v. Wainwright, supra,* n. 7 (requiring Morrissey-type hearing where "good time" may be revoked or disciplinary segregation imposed); *Collins v. Hancock,* 354 F. Supp. 1253 (D.N.H., 1973) (requiring *Morrissey*-type hearing where more than 30 days "good time" may be revoked or more than 5 days solitary or 15 days punitive segregation imposed); *Bundy v. Cannon,* 328 F. Supp. 165 (D. Md., 1971) (requiring *Morrissey*-type hearing where more than 5 days "good time" may be revoked or 15 days segregation imposed).

[26] *Id.*

Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973); *Landman v. Royster, supra; Bundy v. Cannon*, 328 F. Supp. 165 (D. Md., 1971). However, even in these instances, the courts have properly held that the hearing may follow administrative action where the circumstances require prompt attention.[27]

Nor would the presence of counsel or counsel-substitute in these limited number of cases, unduly delay administrative decision-making since the provision of a right to counsel could be conditional upon counsel's prompt presence[28]

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[27] If immediate pre-hearing action by correctional officials is necessary, *see*, n. 24, this action should, at a minimum be predicated on findings that there is a strong probability that the accused prisoner is guilty of substantial misconduct and that his conduct poses a clear and present threat to his safety or the safety of others. In addition, there should be an appropriate investigation and prompt review by supervisory personnel of the action taken by lower echelon correctional officials. *See, e.g., Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md., 1972) (Appendix B).

Although summary decision-making is appropriate in these instances, a hearing should be afforded the prisoner as soon after this decision-making as is reasonably possible. *See, e.g., Bundy v. Cannon, supra*, n. 25 (within 72 hours except where there are "exceptional circumstances"); *Collins v. Schoonfield, supra*, (Appendix B) (48 hours); *Landman v. Royster, supra*, n. 10, at 653 (within "a reasonable interval").

[28] The court in *Landman v. Royster, supra*, n. 10 after holding that prisoners facing severe punishment were entitled to the right to retain counsel at disciplinary hearings, stated:

> On the other hand, the Court has observed that prison officials legitimately desire to conduct disciplinary proceedings speedily. Therefore a prisoner who desires to secure counsel for hearing may be required to notify the committee of that fact, and postponement of the hearing to secure counsel may reasonably be limited to four days, 333 F. Supp. at 654.

and counsel-substitute would be already present in the institution. Moreover, the undisputed right of the administrative tribunal to reasonably order and control the hearing process provides assurance that no undue delays need occur. Indeed, counsel may well be of substantial assistance in expediting disciplinary hearings by properly and professionally presenting the relevant evidence and assisting the tribunal in ordering the hearing.[29]

The contentions that correctional officials will ignore misconduct[30] if fair hearings are required in some disciplinary proceedings and that extending to prisoners the right

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[29] Counsel can also be of service to the administrative tribunal by assisting the tribunal in the very difficult determination of what punishment is due once the prisoner is found guilty of misconduct. The analogy to probation-revocation, *see Gagnon v. Scarpelli, supra*, n. 10, 93 S.Ct. at 1764, and parole-revocation proceedings is apt:

> "Conviction does not obviate the need for counsel, but merely changes the focus of the decision-making process. The [parole] board may not be required to reincarcerate, and the individual should have an opportunity to affect the disposition. The range of dispositional alternatives is broad enough that counsel could be of significant aid to both the board and the parolee in selecting the optimum alternative. Further, considerations at disposition are similar to those at sentencing or probation revocation where the need for counsel has been recognized." "The Parole System," 120 U. Pa. L. Rev. 282, 357 (1972).

[30] *See, generally*, Brief of Petitioners at 35.

of cross-examination at such proceedings will, in some general sense, erode prison security[31] are similarly without merit. The former argument is simply not supported by the experience of prison systems extending such rights[32] and is strikingly similar to a contention made by the state in *Morrissey v. Brewer* and rejected by this Court. *Morrissey v. Brewer, supra,* at 383, n. 10. Furthermore, it may be that the imposition of *Morrissey-Gagnon* standards upon major prison disciplinary proceedings would discourage

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[31] *See,* Brief of *Amicus Curiae,* State of California,at 10, 11.

[32] *See, e.g.,* study cited by Petitioners in their brief at 37 indicating an increase in accusations of prisoner misconduct after entry of a consent decree providing for procedural rights at prison disciplinary hearings. While this study seems to show that procedural due process rights do not broadly discourage officials from punishing misconduct, *Amicus Curiae* National Prison Project does not accept the assertion of Petitioners that the requirement of due process rudiments was responsible for this increase. Indeed, correctional administrators do not share Petitioner's view in this regard:

> Administrators generally believe that increased judicial intervention is responsible for certain types of alterations in prisoner-staff relations. However, administrators attribute the overall decline in respect for institution personnel less to the courts than to those changes in society which have led to similar decline in respect for law enforcement and other established authority generally. Administrators do *not* believe that the increase in physical assaults on staff by prisoners was, in general, caused by the increased judicial involvement in correctional matters. "Judicial Intervention in Corrections: The California Experience" – An Empirical Study, 20 U.C.L.A. L. Rev. 452, 492 (1973). [Emphasis supplied].

78% of the administrators polled in this study indicated their belief that court imposed standards for the treatment of prisoners had no affect on prisoner disciplinary problems. *Id.* at 512.

arbitrary accusations of prisoner misconduct, but that, certainly, is one purpose of, not a defect in, a fair hearing system.

The second contention, that intangible injury to prison security will result from a fair hearing requirement and particularly from the provision of confrontation and cross-examination rights, presumes a staff-prisoner relationship that is archaic. *The President's Commission on Law Enforcement and the Administration of Justice* rejected the concept that prison security is dependent upon unlimited and unquestionable power, stating in its report that "the 'collaborative regime' advocated in this volume is one which seeks to maximize the participation of the offender in decisions which concern him, one which seeks to encourage self-respect and independence in preparing offenders for life in the community. It is inconsistent with these goals to treat offenders as if they have no rights, and are subject to absolute authority of correctional officials." *President's Commission Report*-1967 at 83. In addition, the presence of counsel or counsel-substitute at major disciplinary hearings could provide a "buffer" between prisoner and accusing officer that could reduce prisoner-correctional official conflict.

The positive experience of the many correctional systems that guarantee full hearing rights to prisoners accused of major misconduct[33] provides the best evidence that security is not undermined by such procedures.

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33 "75% of the most commonly identified elements of disciplinary due process are available to prisoners in a majority of jurisdictions . . . ." *Survey of Prison Disciplinary Practices and Procedures*, American Bar Association Commission on Correctional Facilities and Services, at 2 (1974) (Hereinafter cited as *A.B.A. Survey*.)

While the creation of a *Morrissey-Gagnon* hearing system within state prisons would undoubtedly require some initial expenditures of public funds and concentration of administrative resources, it is indisputable that these concerns are not a viable basis for denying procedural due process rights, *see, Goldberg v. Kelly*, 397 U.S. 254, 266 (1970); *Morrissey v. Brewer, supra,*[34] and it is apparent that the burden will not be unduly heavy. The limited number of hearings that would be required,[35] the limited number of cases in which counsel would be required, see *infra*, at p. 34, the present availability of prisoner-assistance programs[36] and the present existence of a number of prison

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34 "[C]onstitutional requirements are not, in this day, to be measured or limited by dollar consideration . . . ." *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

35 *See* n. 25, *supra.*

36 An American Bar Association Survey indicates that there are 63 law schools which have prisoner assistance programs and that a substantial number of state public defender programs have prisoner-assistance components. In addition, a number of states have set up specialized legal service programs for prisoners. *See, Providing Legal Services to Prisoners: An Analysis and Report*, A.B.A. Commission on Corrections Facilities and Services at 15-25 (1973). The Federal Bureau of Prisons has existing legal services programs in many of its institutions. *See*, Affidavit of Eugene Barkin, General Counsel of Federal Bureau of Prisons filed in *Starnes v. McGuire*, No. 73-1034 (pending in D.C. Cir.) (Appendix C).

systems already in compliance with such requirements[37] or easily placed in compliance,[38] support the proposition that the burden is a manageable one.

The contention that the unique features of prison life are relevant to deciding whether a *Morrissey-Gagnon* model for major disciplinary proceedings is appropriate[39] is uncontrovertible. These considerations, however, do not weaken, but bolster the basis for requiring such a hearing.

James V. Bennett, former Director of the Federal Bureau of Prisons, explained that while prison officials control the institutions, subtle manipulations of prison discipline can and do occur: "The prison society has its way of enforcing its rules. Gambling, for example, is illegal

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37 *See generally, A.B.A. Survey*, at 9-11, it would appear that over 20 jurisdictions provide a *Morrissey* hearing, or a reasonable facsimile thereof, to prisoners facing potentially severe punishment. *Id.* at 11. At least 14 jurisdictions apparently allow representation by counsel and at least 39 allow representation by counsel-substitute. *Id.*

38 *Id.* Only 17 of the jurisdictions which responded to the *A.B.A. Survey* indicated that they do not allow prisoners to call witnesses or confront accusers at prison disciplinary hearings. 21 indicated that they don't allow cross-examination. All jurisdictions, it appears, have some already-established hearing process.

39 *See*, Brief of *Amicus Curiae*, State of California at 6-8.

in federal prisons . . . welching on a bet, however, is a sin to be avenged by some subtle method, such as planting dope or a knife beneath the offender's bed and tipping off an officer." J.V. Bennett, *I Chose Prison* 28 (1970). Unwarranted prisoner punishment premised upon untrustworthy evidence or misinformation received from other prisoners is not the sole reason, however, why full procedural protections are necessary. Judicial recognition of the especially real possibility of misuse of authority by prison guards is contained in *Landman v. Peyton,* 370 F.2d 135, 140 (4th Cir. 1966):

> Acton's classic proverb about the corrupting influence of absolute power is true of prison guards no less than of other men. In fact, prison guards may be more vulnerable to the corrupting influence of unchecked authority than most people. It is well known that prisons are operated on minimum budgets and that poor salaries and working conditions make it difficult to attract high calibre personnel. Moreover, the 'training' of the officers in methods of dealing with obstreperous prisoners is but a euphemism in most states.

It is in order to guard against reliance upon the testimony of individuals who "might be prejurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy that we require confrontation and cross-examination." *Greene v. McElroy,* 360 U.S. 474, 496-97 (1959).

2. The state has an affirmative interest in providing prisoners faced with potentially severe punishment with a procedurally fair hearing.

It is patently obvious that the state has no interest in punishing prisoners who are *not* guilty of institutional misconduct. *Morrissey-Gagnon* safeguards are the minimally necessary assurance that factual findings of prisoner misconduct are not arbitrarily made. *See, infra,* at 27. Moreover, as this Court noted in *Morrissey*, "fair treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness . . . ." *Morrissey v. Brewer, supra,* at 484. The prisoner, like the parolee, "is not the only one who has a stake in his conditional liberty." *Id.* Society's "interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions," *id.*, is rooted in the necessity for treating law-breakers lawfully so that future lawful conduct is encouraged.

Penologists[40] have recognized that summary punishment within a prison creates the same reactions to arbitrariness

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[40] David Fogel, Director of the Illinois Law Enforcement Commission and former Commissioner of the Minnesota Department of Corrections, explained the vital necessity of treating prisoners with fairness and justice:

> The justice model seeks to engage both the keeper and the kept in a joint venture, which would force the agencies of justice to operate in a lawful and just manner. It simply means a belief that the prisoner did not use lawful means outside the prison and should therefore be provided more (not fewer) opportunities to learn lawful behavior in the institution. The efforts of the staff should be geared to teaching a prisoner how to use lawful processes to achieve his ends, as well as to

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– hostility, bitterness and anger . . . as arbitrary parole revocation, a reaction that can only serve to undermine a prisoner's respect for authority and therefore, his rehabilitation.[41]

The state, in arguing for abbreviated procedures, ignores its role as "the potent, . . . ominipresent teacher," *Olmstead v. United States,* 277 U.S. 438, 485 (1927) (Dissenting opinion of Justice Brandeis) and disregards the fact that "the validity and moral authority of a conclusion largely depend on the mode by which it is reached." *Joint Anti-Facist Refugee Comm. v. McGrath,* 341 U.S. 123, 171-172 (1951) (Concurring opinion of Justice Frankfurter). Rather than being an impediment to the maintenance of

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[40] (continued) accept responsibility for the consequences of his behavior. In the absence of a continuum of justice in the prison, most ends are reached unlawfully. When unlawful behavior in the prison is detected, the standards of due process that we insist upon outside the prison are not applied. The result is a further indication to the convict that lawful behavior for a convict has little payoff. He can be dealt with arbitrarily and usually responds by treating others in the same manner. The justice model would make sure that the prisoner experienced lawful ways of dealing with problems with the expectation that there would be a carryover to the point of release. The prison experience would try to guarantee that at least for the period of incarceration the prisoner would be exposed to the type of lifestyle that society expects him to pursue when he is released.

Fogel, *The Justice Model for Social Work in Corrections,* Social Work Practice and Social Justice, 26, 32 (N.A.S.W. 1972).

[41] Commentators have also recognized this principle. "It is submitted that one of the most disruptive influences upon the rehabilitative scheme is the belief that the law is arbitrary." Comment, 33 U. Pitt. L. Rev. 638, 642-43 (1972).

discipline, a fair hearing procedure contributes to prison security by reducing prisoner hostility, forcing prisoners to confront their own misconduct and encouraging respect for lawful authority.

An indirect consequence of a fair hearing system, in the interest of the state and our judicial system, might well be a decrease in prisoner litigation. Besides providing a principled basis for reasonable judicial deference to prison decision-making,[42] the creation of fair hearing systems will

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[42] The judicial forum must always be available to remedy arbitrary decision-making, but judicial deference to administrative decision-making is certainly more warranted where the decision-making process is fair. The apparent suggestion by petitioners that this Court hold that state prisoners are outside the protection of the Fourteenth Amendment, *see* Brief of Petitioners at 21, is an argument that courts abdicate their constitutional responsibilties. Indeed, the responsibility of the judiciary may, for several reasons, be heavier when prison policies, such as those in this case, are challenged. The judiciary and correctional officials jointly determine the length of a prisoner's sentence. In imposing sentence, a judge does not anticipate that prison officials will unreasonably revoke a prisoner's "good time" or arbitrarily impose punishment that otherwise increases the period of time a prisoner must be incarcerated. Procedurally fair hearings are the assurance that the sentencing judge's assumptions are warranted.

In addition, in almost every state prison rules and regulations are the product of secret decision-making involving neither the public nor prisoners since most prison systems are not within the purview of state administrative procedure acts. *See, e.g.*, W.Va. Code, §29A-1-2, Art. 1 (1971 Replacement Volume). *See, Palmigiano v. Baxter*, 487 F.2d 1280, 1283-84 (1st Cir. 1973). Judicial deference to these policies is questionable not only because they were promulgated without the beneficial "constraints of public discussion and scrutiny," *id.*, but also because other branches of the government may not be aware of or concerned with problems within prisons. In most states prisoners and ex-felons are barred completely from the political process and cannot vote, run for public office or hold positions of trust. *See generally*, "The Collateral Consequences of a Criminal Conviction," 23 Vand. L. Rev. 929 (1970).

resolve many prisoner-official disputes *within* the prison system and provide a basis, with written findings and summarized testimony, for more easily evaluating the merits of other disputes. Although evaluative data is rare, existing reports seem to indicate that the expectation of reduced prisoner litigation is well founded.[43]

3. A balancing of interests dictates the requirement in this case of a procedurally fair hearing incorporating the elements of *Morrissey* and *Gagnon*.

The nature of a prison disciplinary hearing is quasi-adjudicatory[44] and the interest at stake in such a proceeding, unconditional and conditional liberty is of the greatest

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[43] The experience in the Kansas State Penal System is instructive. Two years ago that system adopted a prison disciplinary code incorporating full procedural protections. *See, A.B.A. Survey*, 11. The experience since then is summarized in the March 10, 1974, Kansas City Star:

> John C. Hazelet, acting penal director, praised Kansas's disciplinary code for inmates, noting that it is a model code now being copied by other states. Among its best features is the granting of right to counsel for inmates charged with serious rule infractions.
>
> Hazelet said that since it was adopted two years ago, inmate lawsuits against penal authorities have dropped 98 percent.
>
> The committee plans to publish its findings as result of the hearings in a few months. *Id.* at p. 5A, cols. 1-4.

[44] *See* n. 22, *supra*.

magnitude. Neither the maintenance of discipline and security nor the proper exercise of professional expertise and administrative discretion by prison officials are compromised by the requirement of a *Morrissey-Gagnon* hearing in major disciplinary cases. Such a process would positively contribute to the rehabilitative goal of incarceration. No state interest justifies the abridgment of any of the basic elements of *Morrissey* or *Gagnon*. Thus, prior to the imposition of severe prison punishment, prisoners should be entitled, at a minimum to the following rights.[45]

a. The right to specific notice of charges, the disclosure of evidence and a written decision.

Prison rules are, in many instances, extremely vague and uncertain.[46] The right to both specific notice of the charges and a written decision containing the evidence relied upon and the reasons for the decision takes on added significance when prohibited conduct is vaguely and generally described. Specific notice not only informs the accused of his alleged misconduct but may also generally serve the accused with initial notice of the precise conduct considered improper by correctional authorities.

The harm caused by the vagueness of prison regulations in describing prohibited conduct is compounded when there is no written decision. The lack of a written decision undermines the prisoner's right to appeal his decision to higher administrative authorities, a right now granted

[45] *See* n. 16, *supra*.

[46] *See, e.g., Landman v. Royster, supra*, n. 10 at 655-56; *Dabney v. Cunningham*, 317 F. Supp. 57 (E.D. Va., 1970); *Smoake v. Fritz*, 320 F. Supp. 609 (S.D.N.Y., 1970). *See generally*, Jacob, *supra*, n. 6 at 235-37.

by virtually every prison system, *see A.B.A.*, Survey at 11, since the reviewing body is unable to appreciate with particularity the acts which the accused is found to have committed and the evidence supporting a determination of guilt. The result can only be unthinking deference to the decision of the lower administrative body. Finally, it is clear that the opportunity to defend against charges of misconduct is valueless unless the basis for the allegations of misconduct are disclosed to the accused. *Cf. Morrissey v. Brewer, supra.*

Lower court opinions, *Bundy v. Cannon, supra; Landman v. Royster, supra; Sands v. Wainwright, supra, Workman v. Mitchell,* Civil Action No. 8-71C3 (W.D. Wash., July 20, 1973); *Clutchette v. Procunier,* 328 F. Supp. 767 (N.D. Cal., 1971); *Walker v. Hughes, supra,* (Appendix A)[47] and the rules of virtually all prison systems, *A.B.A., Survey at 11,* require written notice prior to hearing and punishment and a written decision which includes findings, a summary of the evidence and reasons for the decision.

b. The right to confrontation, cross-examination and witnesses.

The right to confront and cross-examine opposing witnesses has been accepted as being appropriate and necessary "[i]n almost every setting where important decisions turn on questions of fact." *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970). The requirement that major prison disciplinary proceedings guarantee prisoners the right to confrontation and cross-examination, unless "good cause" for not allowing confrontation is shown, *Morrissey v. Brewer,*

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[47] *Accord, United States ex rel. Miller v. Twomey, supra,* n. 7, (7th Cir. 1973); *Gray v. Creamer,* 465 F.2d 179 (3rd Cir. 1972).

supra, is vital to avoid arbitrary decision-making.[48] For the same reasons, prisoners should be entitled to call witnesses in their behalf at major disciplinary proceedings. It is an empty promise to guarantee fairness while omitting the tools necessary to accomplish that fairness.[49] Lower

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[48] Wigmore, *A Treatise on the Anglo-American System of Evidence*, §1367 at 28-29 (3rd ed. 1940) states:

> For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement . . . should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. *See, Sands v. Wainwright, supra*, n. 7, at 1087.

[49] The contention of *Amicus Curiae*, United States that the Federal Bureau of Prisons' Policy Statements on Inmate Discipline (7400.5B) and Withholding, Forfeiture and Resotration of Good Time (7400.6A) are constitutional, disregards the fact that these procedures omit the most critical procedural elements for avoiding arbitrary decision-making. Policy Statement 7400.5B does not allow prisoners the rights to confrontation, cross-examination or presentation of witnesses or the right of representation, despite the fact that prisoners going before the adjustment committee face potentially severe punishment. *See, e.g., Adams v. Carlson, supra*, n. 10.

Policy Statement 7400.6A empowers the Good Time Forfeiture Board to substantially affect the length of a prisoner's sentence without providing him with the right to cross-examination or confrontation or the right to be represented by counsel. *See, Workman v. Mitchell*, 8-71C3 (W.D. Wash., July 20, 1973).

"Fact-finding" inevitably becomes automatic deference to the contentions of unknown accusers under these circumstances. *See, Walker v. Hughes, supra*, n 11 (Appendix A); *Workman v. Mitchell, supra*

court opinions, *id.*,[50] the rules of many prison systems, A.B.A. Survey at 11, and model codes[51] recognize the necessity for providing prisoners with these basic rights.

c. The right to an impartial tribunal

It is essential that an impartial tribunal preside at any constitutionally required hearing, *Morrissey v. Brewer, supra; Goldberg v. Kelly, supra; In re Murchison*, 349 U.S. 133, 136 (1955). To be impartial a tribunal should be as nearly as possible free from interests which conflict with its obligation to fairly and objectively find facts and apply law. *Id.* The importance of an impartial tribunal to prisoners facing potentially severe punishment may be even greater than to parolees facing revocation in light of

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[50] *Palmigiano v. Baxter*, 487 F.2d 1280 (1st Cir. 1973); *Workman v. Mitchell, supra*, n. 49; *Colligan v. United States*, 349 F. Supp. 1233 (E.D. Mich., 1972); *Bowers v. Smith*, 353 F. Supp. 1339 (D. Vt., 1973); *Walker v. Hughes, supra*, n. 11; *Bundy v. Cannon, supra*, n. 25; *Landman v. Royster, supra*, n. 10; *Sands v. Wainwright, supra*, n. 7; *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Calif., 1971); *Collins v. Hancock*, 354 F. Supp. 1253 (D.N.H., 1972).

[51] *Standard* 2-12, *Advisory Commission Report*-1973, at 51; Rule V-7, *Model Rules and Regulations on Prisoners' Rights and Responsibilities*, Center for Criminal Justice, Boston University School of Law, 1973, at 165-66.

the closed and secluded nature of a prison setting.[52] Lower courts have suggested various administrative mechanisms for insuring impartiality.[53]

d. The right to counsel

Johnson v. Avery, 393 U.S. 483 (1969) established the constitutional right of prisoners to render legal assistance to fellow prisoners. That decision was based upon the fact that many prisoners are uneducated and inarticulate and simply unable to adequately represent themselves. This Court recently recognized that where accusations of rule violations are made and conditional liberty is at stake an "unskilled or uneducated" person is at a distinct disadvantage and "may well have difficulty in presenting his

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52 Control over official discretion within prison walls is vital for other reasons as well. Most decision-making of correctional personnel is less visible to the public than is the decision-making of other public officials, and therefore less likely to benefit from the inherent contraints of public discussion and scrutiny.

Prisoners themselves have no opportunity to participate in a political process which might otherwise provide some guidance for official discretion. Moreover, because prisoners are under the constant care and supervision of correctional personnel within "total institutions" which regulate every aspect of their lives, there exist awesome possibilities for misuse of discretion to the extent that decisions which affect prisoners in important ways may be made arbitrarily or based upon mistakes of fact. *Palmigiano v. Baxter, supra*, n. 50, 487 F.2d at 1283-84.

53 These alternatives include, *inter alia*, requiring that the hearing officer be a lawyer, *see Collins v. Schoonfield, supra*, n. 27 (Appendix B), requiring that at least one member of the administrative

(continued)

version of the disputed set of facts . . . ." *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 1762 (1973).[54] An unskilled or uneducated prisoner, when faced with accusations of misconduct and potentially severe punishment, is doubly disadvantaged. He must not only struggle with his lack of education, but also must overcome the fact that he is probably segregated from potential witnesses prior to the hearing, that his testimony will be presumed to lack credibility,[55] and that his hearing will be held in a private

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[53] (continued) tribunal be from outside the particular institution conducting the hearing, *see Bundy v. Cannon*, *supra*, n. 25, and requiring at a minimum, that the official initiating or involved in processing the charges of misconduct be disqualified from sitting as part of the administrative tribunal. *See, Landman v. Royster*, *supra*, n. 10.

[54] The right of counsel is a bare necessity for due process of law when the inmate's length of incarceration is involved. It is virtually impossible for an inmate to marshal a legal defense by himself. Even if he has easy access to legal materials he is not able to conduct an investigation separate from that of the disciplinary committee; obviously all of these problems are magnified if the prisoner is in punitive segregation. Comment, 17 Wayne State U. L. Rev. 931, 947 (1971).

[55] *See*, Brief of *Amicus Curiae*, State of California at 7.

and potentially hostile atmosphere. It is this combination of factors that supports the requirement of counsel pursuant to the guidelines set forth in *Gagnon v. Scarpelli, supra.*

Prison officials have little reason to oppose such a prisoner right. The necessity for providing counsel will only arise in a small minority of cases, those which potentially threaten severe punishment and which satisfy *Gagnon* requirements. Indeed, the appointment of counsel may not be necessary in some or even most of the cases where the right is constitutionally recognized since waiver of this right will certainly occur and prisoner legal assistance programs exist which may well satisfy this need.[56]

No other state interest justifies the denial of the right to counsel. Its provision need not cause delay, see *supra,* at 17. It is hardly plausible that disciplinary hearings will be more burdened by the presence of counsel than the presence of counsel-substitute, which most prison systems now allow, *see A.B.A. Survey at 11,* and there is no basis for assuming that the presence of counsel at prison disciplinary hearings will be any more difficult for administrators to cope with than the presence of lawyers at other administrative hearings. *See Gagnon v. Scarpelli, supra; Goldberg v. Kelly, supra; Caulder v. Durham Housing Authority,* 433 F.2d 998 (4th Cir. 1970), *cert. den., Housing Authority of City of Durham, N.C. v. Caulder,* 401 U.S. 1003 (1971).[57]

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[56] *See* n. 36, *supra.*

[57] *Amicus Curiae* National Prison Project share Respondents' view that the right to appointed and retained counsel stands on a basis independent of due process. *See,* Brief of Respondents at 32.

In cases where severe punishment is possible, but it is not constitutionally required that counsel be appointed, prisoners should be afforded the right to retain counsel, *see, Palmigiano v. Baxter,* 487 F.2d 1280 (1st Cir. 1973); *Landman v. Royster, supra; Sands v. Wainwright, supra; Workman v. Mitchell, supra; Collins v. Schoonfield, supra.*[58] or, at a minimum, the right to representation by counsel substitute. *See Bundy v. Cannon, supra; Colligan v. United States,* 349 F. Supp. 1233 (E.D. Mich., 1972); *Morris v. Travisono,* 310 F. Supp. 857 (D.R.I., 1970).

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[58] *Accord: Bowers v. Smith, supra,* n. 50; *Inmate 24394 v. Schoen,* 363 F. Supp. 683 (D. Minn., 1973); *Walker v. Hughes, supra,* n. 11. (Appendix A) Model codes provide for this right. *See,* § 4, *A Model Act for the Protection of Rights of Prisoners,* (National Council on Crime and Delinquency at 17, (1972) (Providing for counsel where punishment "may affect the sentence or parole eligibility – such as the loss of good time allowance"); Rule V-8, *Model Rules and Regulations on Prisoners Rights and Responsibilities,* at 167, Center for Criminal Justice, Boston University School of Law (1973); *Standard* 2.12, *Advisory Commission Report*-1973.

CONCLUSION

For the reasons stated above, *Amicus* prays that the decision below be affirmed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RANDOLPH WALKER, *Plaintiff,* vs. CHARLES HUGHES, former Warden, and HERB BEAL, individually and in his capacity as Warden of the Federal Correctional Institution at Milan, Michigan, *Defendant.*	:	No. 39765
DANIEL S. BRIDGE, on behalf of himself and all others similarly situated, *Plaintiffs,* vs. CHARLES HUGHES, former Warden, and HERB BEAL, individually and in his capacity as Warden of the Federal Correctional Institution at Milan, Michigan, *Defendant.*	:	No. 39834
MELVIN DRAIN, *Plaintiff,* vs. CHARLES HUGHES, former Warden, and HERB BEAL, individually and in his capacity as Warden of the Federal Correctional Institution at Milan, Michigan, *Defendant.*	:	No. 40066

MEMORANDUM OPINION

In this class action plaintiffs allege that the procedures of the adjustment committee at the Federal Correctional Institution at Milan, Michigan (Milan) deprive the plaintiffs of liberty and property without due process of law in violation of the Fifth Amendment of the Constitution.[1] Plaintiffs contend that three distinct deprivations occur: (1) Inmates' liberty is further restricted by placement into segregation. (2) Inmates' are transferred from Milan to maximum security penitentiaries for long-term adults. (3) Inmates' parole dates are adversely affected.

Milan is a medium security institution for young offenders. It has a wide-range of rehabilitative programs for its inmates, including vocational training, education, psychiatric and psychological therapy, and recreation. Defendant Herbert Beall is the Warden at Milan, and is responsible for the administration of the institution.[2]

The parties have stipulated that plaintiffs Randolph Walker and David Bridge are representatives of the class of plaintiffs consisting of all inmates at Milan who are subject to the adjustment committee. Plaintiff Melvin Drain brought suit in this court on the same or similar issues, and these cases were consolidated for trial and decision.

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[1] This court was faced with a similar issue in Colligan v. United States, 349 F. Supp. 1233 (E.D. Mich., 1972).

[2] The suit was originally filed against Charles Hughes, the former Warden at Milan. The parties stipulated to the substitution of party-defendant.

I. FINDINGS OF FACT

Plaintiff Walker

1. Prior to February 7, 1973, plaintiff Walker was housed in the therapeutic community at Milan. Therein, Walker enjoyed the benefits of freedom of movement within the unit, personal and group therapy, recreation, education and vocational training.

2. After an incident on February 7, 1973, Walker was placed in segregation and given a written incident report, written by guard Richard Cox, accusing him of assaulting another inmate during the incident.

3. Sometime on or before February 9, 1973, Walker's caseworker and counselor, Richard Rison, as well as Lt. Ashworth and Capt. Yinger, questioned Walker concerning the incident.

4. Thereafter, at least four adjustment committee hearings were held concerning the Walker incident.[3] At the first, on February 9, 1973, the committee consisted of Rison, Dr. Weaver (Chief Psychologist) and Mr. Edgington (Business Manager). Walker was instructed to tell his side of the story, which he did. No decision was reached at this hearing.

5. On February 12, 1973, a second hearing was held. The committee at this hearing consisted of Capt. Yinger, Officer Friedman and Associate Warden Guienze. Walker repeated his story and no decision was reached.

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[3] Findings of fact numbers 4, 5, 6, 7 and 9, are based on a stipulation of the parties. Walker testified to somewhat different facts as to the committee membership at each of his hearings.

6. On February 14, 1973, the committee met for the third time. The members of the committee were the same as those at the second hearing. Again no decision was reached.

7. Another hearing was held on February 16, 1973. This time the committee consisted of Capt. Yinger, Warden Guienze and Caseworker Rison. At this hearing, Walker changed his story. At the fifth hearing he was informed of the committee's decision to recommend his transfer to the penitentiary at Terre Haute, Indiana. Later it was determined that Walker would be transferred to the federal penitentiary at Lewisberg, Pennsylvania, a maximum security institution.[4]

8. According to the committee's written finding of guilt in the Walker case, the finding was based on "information provided by investigation into the incident."

9. At some point the assault charge was referred to the Federal Bureau of Investigation for possible prosecution, but this was subsequently declined.

10. Walker was never told at any of the hearings: (a) that he could have counsel or counsel substitute; (b) that what he said might be used against him; (c) that he could confront his accuser; (d) that he could call witnesses in his defense; (e) that he could see the investigative reports.

Plaintiff Bridge

11. The parties stipulated to the following findings of fact with respect to Bridge:

[4] The court entered a preliminary injunction prohibiting this transfer. Walker resided in a segregation unit at Milan from February, 1973, until December of 1973, when he was released to the general population.

"On or about January 17, 1973, Petitioner, DANIEL S. BRIDGE, was charged by the respondent on his authorized representative with five acts: (a) engaging in, or encouraging, a group demonstration; (b) refusing to obey an order from any staff member; (c) conduct which disrupts or interferes with the security or orderly running of the institution; (d) participating in an unauthorized meeting or gathering; and (e) assaulting a staff member.

On the evening of January 18, 1973, Petitioner was informed of the charges against him.

On January 22, 1973, before the 'adjustment committee,' petitioner made a request to have counsel appointed to represent him.

He (Petitioner) denied touching the officer in the above incident.

Petitioner was found guilty of all offenses charged on January 17, 1973.

Petitioner requested to confront the officer making the charges. The request was denied.

As a result of these charges, Petitioner was confined to Administrative Segregation.

He was not offered assistance of counsel or counsel substitute. He was not allowed the opportunity to call witnesses on his own behalf. Nor was he allowed to confront and cross-examine adverse witnesses.

A member of the adjustment committee was Captain Yinger. Mr. Bridge's complaining officer on January 17, 1973, is Senior Correctional Officer, Bunkie Elliott.

Petitioner originally filed his Motion for Writ of Habeas Corpus on or about March 21, 1973. Subsequently he was transferred to the Federal Correctional Institution at Terre Haute, Indiana, on April 13, 1973. He was confined to administrative segregation at Terre Haute from his arrival through May 21, 1973."

Plaintiff Drain

12. Prior to April 10, 1973, Drain was placed in the honor block at the institution. The benefits of this placement included an unlocked room and unlimited visitation by his family which resides in Detroit.

13. On April 10, 1973, Drain was charged with possession or introduction of any narcotic paraphernalia, and given written notice of the charge in an incident report.

14. The adjustment committee in Drain's case received the following report in an investigation into the incident:

"Drain has been named several times as the 'kingpin' in our drug activities in the Institution. He was suspected of pressuring inmates working in the business office to introduce contraband drugs. On one situation after receiving information that he had pressured an inmate for this purpose, a large amount of marijuana was found on a study release inmate that we suspect was intentionally dropped prior to search. Due to lack of conclusive evidence, we were unable to charge Drain with this incident. I might add that earlier

> this date there was a fight involving two unknown black inmates in F-1 Dormitory, the combatants ran from the dorm and could not be identified. Drain has a larceration on his leg and scratches on his hand that could have resulted from a fight."

Also, the investigator stated:

> "It is the conclusion by this writer that DRAIN is the most active and powerful of the suspected drug dealers within the institution."

15. At the hearing Drain was asked to explain his side of the story and he denied any connection with the incident. Drain wanted to call a witness on his own behalf but was not allowed to do this.

16. The committee found Drain guilty. In its written findings, the committee stated that this was based on the "incident report" and on "your statement," referring to Drain's denial.

17. Finding number 10, *supra*, applies to Drain.

18. Pursuant to the recommendation of the adjustment committee, Drain was transferred to the Federal Penitentiary at Terre Haute, Indiana, a maximum security institution for long-term adults, and was held in segregation for considerable time upon his arrival.

Witness Saxner

19. Prior to August 17, 1973, witness Saxner was incarcerated at Milan. On that date, he asked a prison employee, Lopez, about improperly handling a fellow prisoner.

A discussion ensued; other inmates gathered. Lt. Edwards of the staff arrived, and asked Saxner to tell him what happened.

20. That afternoon, Saxner was called to Capt. Yinger's office. Also in the office were Lt. Ashworth, Caseworker Rison and other officers. Saxner was given a written incident report charging him with threatening an officer, insolence toward a staff member and conduct which disrupts or interferes with the security or orderly running of the institution. Lopez was the accuser.

21. In Capt. Yinger's office, Saxner was asked if he had anything to say, and he denied the allegations. Lt. Ashworth told him he was unsuited for Milan and that he was being transferred to the Federal Penitentiary at Terre Haute, Indiana immediately. This transfer was termed an "administrative" transfer, rather than one resulting from an adjustment committee finding of guilt. That day Saxner was transferred to Terre Haute.

22. Finding number 10, *supra*, applies to Saxner.

23. At Terre Haute, Saxner has been kept in segregation. Part of the basis for this has been the August 17, 1973, incident report at Milan.

24. Saxner was never found guilty and never appeared before an adjustment committee denominated as such.

Witness Horton

25. Prior to August 21, 1973, Dale Horton was an inmate at Milan. On that date he was given an incident report charging him with conduct disruptive to the institution and encouraging a group demonstration. This charge

was based on the discovery of three posters in Horton's locker. Identical posters were found throughout the prison that day. The posters stated "United, Do It Now, Fast."

26. The next day Horton appeared at the adjustment committee and was asked to give his version of the facts. He admitted possession of the posters, but stated he had found them.

27. Finding number 10, *supra*, applies to Horton.

28. The committee found Horton guilty on August 22. Part of the basis on which that finding was made was a rumor that Horton was a "troublemaker." (This was testified to by Capt. Yinger). Also cited in the incident report, as evidence of the incident, was the fact that a list of "addresses of several people and news medias from outside the institution" was found in the locker.

29. The committee decided that Horton should be transferred to the Federal Correctional Institution at Petersburg, Virginia.

30. The court finds that inmates at Milan are subject to three deprivations if found guilty by the adjustment committee: (a) Inmates may be placed in segregation where their rehabilitative programs are severely restricted. (b) Inmates may be transferred from Milan, a medium security, long-term adult facility. (c) Inmates' parole dates are adversely affected.

31. Further, the court finds that it is the practice of the administration at Milan in cases before the adjustment committee that a written incident report is given to the accused inmate, signed by the accusing staff member; that an investigation is undertaken and a statement is taken from the accused inmate; that the report of the investigation

is given to the committee; that the committee asks the accused inmate his version of the facts; and that when a finding of guilty is made, it is based on the investigation report.[5]

32. Finally, the court finds that the administration at Milan in adjustment committee cases does not afford an accused inmate an opportunity to confront and cross-examine adverse witnesses, to call witnesses in his own defense, to remain silent, or to see investigation reports. Also, no attempt is made to provide a continuously identical panel of fact finders, or to exclude either staff who have investigated the incident, or the inmate's caseworker.

II. DISCUSSION

As noted, the prisoners contend that the extent of the deprivations visited upon an accused inmate who is found guilty by the adjustment committee requires the application of certain aspects of due process in an adjustment committee hearing. The government contends that the only due process procedures required are those already used by the adjustment committee.

In analyzing this issue, the court is guided by the analysis in *Morrissey v. Brewer*, 408 U.S. 471 (1972). Therein,

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[5] These procedures are in substantial compliance with the Milan Institution Policy Statement; Subject: Inmate Discipline, MM 7400.1, 7-20-72. *See also*, Bureau of Prisons Policy Statement; Subject: Inmate Discipline, No. 7400.5B, 6-6-72, which is quoted at length in *Colligan, supra*, n. 1, 349 F. Supp. at 1238-39, n. 1.

the Supreme Court held that the due process clause of the Fourteenth Amendment required that certain procedural rights be afforded a parolee before his parole can be revoked. In reaching this conclusion, the court first examined the nature of the parolee's interest in remaining on parole, in order to dertermine whether the interest was within the scope of the protection of the Fourteenth Amendment. Then the court, having determined that due process applied, balanced the interests of the government with those of the parolee, to determine what process was due.

A. The inmate's interest in remaining in the general population

The evidence in the case is strong that an inmate has a substantial interest in remaining in the general population or in one of the honor units at Milan. Once put in segregation, an inmate loses benefits[6] that are important to him; they form the very core of his rehabilitative program. These include psychological therapy, recreation and exercise, and education and vocational training. Perhaps more important is the substantial loss of freedom of movement. An inmate in segregation is allowed out of his cell only for visiting, showers, medical treatment and one hour of exercise per day.

An inmate who is transferred to a maximum security institution for long-term adults sustains losses in addition to those discussed above. *See, Capitan v. Cupp*, 356 F. Supp. 302, 303 (D. Ore., 1972); *Gomes v. Travisono*, 353

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[6] It does not matter whether these benefits are labeled "rights" or "privileges." *Morrissey v. Brewer*, 408 U.S. at 482. *See also, Landmar v. Royster*, 333 F. Supp. 621, 651 (E.D. Va., 1971).

F. Supp. 457 (D. R.I., 1973); *White v. Gillman*, 360 F. Supp. 64 (S.D. Ia., 1973). A most significant disadvantage is the change from confinement with inmates of similar age to confinement with inmates of older age.[7] Further, it is the practice of the prison authority at Terre Haute, to which two witnesses were transferred from Milan, to place transferees into segregation for a considerable time.

Finally, there is no dispute that the parole date of an inmate found guilty of a disciplinary infraction is adversely affected.[8]

These deprivations to an inmate found guilty virtually end the inmate's rehabilitative program. The deprivations amount to a "grievous loss," within the meaning of *Morissey, supra.*[9] The court concludes that the interests of an

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[7] In 1972, the average age of prisoners at Milan was 23.5 years, while at Lewisberg, the average age was 31.8. Federal Bureau of Prisons Statistical Report, 1972, at p. 34.

[8] Disciplinary infractions and placement in segregation deprive an inmate of "the opportunity to appear under more favorable circumstances before the parole board for consideration for release on parole." *Carothers v. Follette*, 314 F. Supp. 1014, 1027 (S.D. N.Y. 1970). This also applies to youth offenders whose release dates are determined by the Youth Corrections Division of the Board of Parole under 18 U.S.C. 5017(a). *See also, Clutchette v. Procunier*, 328 F. Supp. 767, 777 (N.D. Cal., 1971).

[9] "Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer a grievous loss." *Morrissey v. Brewer*, 480 U.S. at 481.

inmate in remaining in the general population, or in an honor unit, are substantial and that the due process clause of the Fifth Amendment is applicable and an inmate must be afforded a minimal due process hearing before he can be deprived of these benefits.[10]

B. Balancing the interests

Chief Justice Burger stated in *Morrissey v. Brewer, supra,* at 481:

> "It has been said so often by this court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."

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[10] There was a time when courts would not entertain prisoners' challenges to prison procedure. *See, e.g., Powell v. Hunter,* 172 F.2d 330 (19th Cir. 1949). But the recent decisions are unanimous that while courts will not interfere with the broad discretion exercised by prison officials, courts will entertain prisoner petitions asserting violations of constitutional rights and will grant relief where appropriate. *See, e.g., Johnson v. Avery,* 393 U.S. 483 (1969); *Matthews v. Hardy,* 420 F.2d 607 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 1010 (1970); *Beard v. Alabama Bd. of Corrections,* 413 F.2d 455 (5th Cir. 1969); *Jackson v. Bishop,* 404 F.2d 571 (8th Cir. 1968); *Nolan v. Scafati,* 430 F.2d 548 (1st Cir. 1970); *Gray v. Creamer,* 465 F.2d 179 (3d Cir. 1972); *Breeden v. Jackson,* 452 F.2d 578 (4th Cir. 1972). Thus it is stated that prisoners do not lose all of their constitutional rights when they enter a prison. *See, e.g., Jones v. Wittenberg,* 323 F. Supp. 93 (N.D. Ohio, 1971), *aff'd sub nom., Jones v. Metzger,* 456 F.2d 854 (6th Cir. 1972). "A prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law." *Coffin v. Reichard,* 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945).

The determination of what process is due must be the result of a balancing of the governmental function served by the adjustment committee and the inmates' interests to be affected thereby.

1. The function of the adjustment committee

The chief objectives of the processes of the adjustment committee are the security of the prison and the discipline (rehabilitation) of the inmates. The government argues, and the court agrees, that the prison administration needs a process for enforcing its rules, for the protection of the inmates, the administration and indeed society itself. Moreover, each inmate, as part of his rehabilitation program, needs to learn to live "by the rules" as a prerequisite to a successful life in society.

The prison administration is interested in a process that best advances the goals of internal security and inmate discipline. Such a process is one that operates swiftly and efficiently, for an inmate who knows that such a process will be visited upon him will be less likely to break the rules.

But the goals of internal security and inmate rehabilitation are also advanced by a process that provides optimum opportunity for an accurate determination of the truth of the accusation. An innocent inmate whose rehabilitation program is ended following an erroneous finding of guilt is an inmate quite likely to be beyond rehabilitation thereafter. The court emphasizes the rehabilitation objective of the Milan facility. *Cf.*, 18 U.S.C. §§4081 and 5011.

Also, in light of the rehabilitation objective, the prison administration should be interested in a process that gives

the inmate the sense that his case is fairly and justly decided. Such a process can assist in the inmate's rehabilitation by teaching respect for law.

2. The interests of the inmate

Turning now to the process in which the inmate is interested, it is apparent that he is likewise interested in accuracy, because of the nature and extent of the deprivations he may suffer.

He is also interested in efficiency. In addition to the concern caused by the pendency of the unresolved accusation, an inmate can reasonably be expected to suffer the anxiety of segregation that is commonly visited upon an inmate pending final determination of the charge. Also, as a result of segregation, an inmate's rehabilitation is interrupted and his release time may be affected.

C. The present process

It is apparent to the court that the prison administration, in determining what procedures to incorporate into its adjustment committee process, places heavy emphasis on efficiency and case of administration. The procedure now in use consists of little more than written notice to the inmate and an opportunity for the inmate to make a statement. The court cannot sanction such a process. The process puts too little emphasis on accuracy, a goal in which both the inmate and the administration have a strong interest. More important, the process is one that makes no effort to instill in the inmate a sense of fairness and justice. It does not aid in his reconciliation to society.

This does not mean that the full panoply of criminal due process rights must be accorded to an inmate. Such a process would give too little weight to efficiency and would unduly burden prison resources.

D. The due process requirements

In determining what process is constitutionally due in a prison setting the court is guided by the need for a compromise between efficiency and accuracy in the procedures of the adjustment committee. The issue has faced other courts with respect to other kinds of institutions.[11] The cases are unanimous that a prisoner is entitled to notice of the charges, to confront the evidence, and to make a statement. *See, e.g., Sostre v. McGinnis,* 442 F.2d 178 (2d Cir. 1971); *Braxton v. Carlson,* 483 F.2d 933 (3d Cir. 1973); *Clutchette v. Procunier,* 328 F. Supp. 767 (N.D. Cal., 1971); *Sands v. Wainwright,* 357 F. Supp. 1062 (M. D. Fla., 1973).

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[11] The defendant relies heavily on *Sostre v. McGinnis,* 442 F.2d 178 (2d Cir. 1971). The petitioner therein, an inmate at Green Haven Correctional Facility in New York, challenged his placement into segregation. The court held that a procedure involving notice of the accusation, confrontation with the evidence and an opportunity to make a statement was sufficient to satisfy due process requirements.

Sostre is distinguishable on several grounds. That case dealt with a long-term adult offender incarcerated in a maximum security institution, the primary objection of which is not rehabilitation. Also, *Sostre* was decided before *Morrissey v. Brewer, supra.*

A neutral, detached and continuously identical panel of fact-finders is essential to an accurate determination of fact in each case. *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Thus from the adjustment committee must be excluded any employee who investigated the incident, the accused inmate's caseworker (because of the confidentiality of the relationship), and anyone in a superior-subordinate relationship with the accuser (to eliminate the possibility of "command influence"). This principle was violated in several respects in this case. Walker's caseworker, Rison, served on Walker's adjustment committee. Moreover, both Rison and Capt. Yinger (who also sat on the committee) questioned Walker about the incident before the first hearing. The court notes that Walker's committee was not continuously identical at each of its several meetings. The requirement of continuity will not only aid in fact-finding accuracy, but it will also make the process more efficient, and will help instill the sense of fairness that the inmate needs for his rehabilitation.

An inmate must be permitted to remain silent. Every inmate who testified stated that he was "instructed" or "requested" to tell his side of the story. Taking advantage of the right to remain silent must not constitute an automatic waiver of defense, however; an accused inmate must be afforded the opportunity to confront the evidence. Again, no inmate was given this opportunity. To give substance to both the right to remain silent, and the right to confront evidence, the inmate must be allowed, subject to reasonable regulation, to confront and cross-examine adverse witnesses, to see tangible evidence, and to present defense witnesses. History and tradition teaches that these procedures are essential to an accurate determination of the

truth of an accusation.[12] *See Morrissey v. Brewer, Goldberg v. Kelly, supra; Greene v. McElroy,* 360 U.S. 474 (1959); *Clutchette v. Procunier, supra; Sands v. Wainwright, supra.* At the same time, these procedures need not unduly burden prison resources, nor unduly lengthen the committee process. The court will approve reasonable regulations allowing the adjustment committee wide discretion with respect to the scope and length of cross-examination, and the number of defense witnesses. Even if there is a minimal loss in efficiency through the use of these procedures this is counter-balanced by an increase in the reliability of the fact-finding process, and by an increase in the accused inmate's sense that he was fairly treated. Thus due process does not permit these procedures to be excluded arbitrarily from every adjustment committee case.

The court also holds that an accused inmate must be afforded, again subject to reasonable regulation, counsel or counsel-substitute, such as another inmate, a prison employee, or a law student. Again this will aid in the fact-finding process without burdening prison resources or lengthening the process.

Finally, the court holds that the decision of the adjustment committee must be based upon, and only upon, the evidence. Several violations of this principle occurred in the case. Several inmates were found guilty on the basis of the accusation itself. Also, part of the basis for the finding of guilt in Drain's case was rumor and opinion

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12 "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly,* 397 U.S. at 269.

concerning Drain's drug activities.[13] A written decision summarizing the evidence and the reasons for the decision will force a close scrutiny of the evidence, without burdening the process.

These procedures must be employed in every case before the adjustment committee. In addition, the process must be applied every time that an inmate is subject to substantial deprivations for alleged violations of prison rules. The administration cannot avoid constitutional due process requirements by labeling a transfer "administrative" rather than "disciplinary," as happened in Horton's case.

Further, the court recognizes the need for segregation of an accused inmate, pending final determination. However, in such a situation, the process must be commenced as soon as it is reasonably feasible.

Finally, each accused inmate must be informed either orally or in writing of his procedural rights when he appears before the committee.

III. CONCLUSIONS OF LAW

1. The nature and extent of the deprivations visited upon an inmate found guilty by the adjustment committee are such that the due process clause of the Fifth Amendment applies to adjustment committee processes.

2. The process now employed by the prison administration at Milan does not comport with due process in that it gives too much weight to efficiency and case of administration and insufficient weight to the accuracy of the

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[13] *See also*, finding of fact number 28, *supra*.

process and the desirability of instilling a sense of fair play into the inmate, in light of the rehabilitation objective of Milan.

3. Due process in the circumstances of this case requires that an accused inmate be afforded:[14] (a) a neutral, detached and continuously idential panel of fact-finders, from which must be excluded investigators, the accused inmate's caseworker, and any one in superior-subordinate relationship with the accuser; (b) the opportunity to remain silent; (c) the opportunity to confront his accuser; (d) the opportunity to cross-examine adverse witnesses; (e) the opportunity to present defense witnesses; (f) counsel or counsel substitute; (g) a written decision based upon and only upon the evidence; (h) oral or written notice of his procedural rights; (i) a hearing as soon as reasonably feasible after an inmate is placed in segregation following an alleged incident.

IV.

The court has received letters and petitions from several inmates at Milan (plaintiffs in this class action), concerning the procedures of the adjustment committee. The court requests that counsel in the case meet with a prison official to discuss the proper disposition of these matters, in light of this opinion.

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[14] As noted above, due process also requires written notice to the accused inmate. *See Colligan*, n. 1, *supra*. However, the court will not incorporate such a requirement into an order, because the prison administration currently gives written notice as part of its procedure. *See* finding of fact number 31, and n. 4, *supra*.

The court will order the return to Milan of the named plaintiffs who have been transferred to Terre Haute. Further, the court will order the reinstatement of each named plaintiff to the status and quarters he occupied prior to the alleged incident that resulted in his segregation or transfer, unless the prison administration affords the inmate a new hearing that fully complies with this opinion. Also, the court will order each named plaintiff's prison record expunged of any record of any hearing that does not comply with the mandates of this opinion.

An appropriate order including within its terms a certification as to the class, may be submitted.

/s/ JOHN FEIKENS

John Feikens
United States District Judge

Dated: Detroit, Michigan
January 24, 1974

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APPENDIX B

Excerpted from *Collins v. Schoonfield*,
344 F. Supp. 257 (C.D. Md., 1972) (interim decree).

IV. HEARINGS

A. Time within which hearing is to be held

No inmate shall be placed in any solitary, isolation or seclusion cell without a prior hearing unless (1) the inmate's conduct poses a serious, immediate and substantial threat to the safety of himself or others or security of the institution, and (2) the circumstances are such as to demonstrate strong probability of guilt, and (3) there is an appropriate investigation or due inquiry to assure that the punishment is not arbitrary or irrational.

Whenever a hearing is required, it shall be held within forty-eight (48) hours (within twenty-four (24) hours if at all possible in the case of use of a strip cell as provided in Part II(A)) except that if any Saturday, Sunday or holiday falls within such forty-eight hour or lesser period, the hearing shall take place on the Monday following any such Saturday or Sunday, or on the day following any such holiday, as the case may be.

B. Notice of charges

Written notice of charges shall be given at least twenty-four (24) hours before the hearing except when the hearing is required by this Decree to be held in less than forty-eight hours, in which event such notice shall be given at least twelve hours before the hearing. Any such notice requirement may be waived by the inmate involved. The

notice shall state the particular law or Jail Rule allegedly violated, a description of the alleged misconduct, names of witnesses and the date of the hearing.

C. Hearing officer

The hearing shall be held before a hearing officer who shall be a member of the Maryland Bar, who shall be selected by and be responsible to the Jail Board, and who shall not be under the jurisdiction of the warden.

D. Representation of inmate

The inmate involved shall have the right to be represented at the hearing either by a member of the bar, or by a counsel-substitute such as a law student, a Jail employee or another inmate. If an inmate states in writing that he desires counsel or counsel-substitute and that he is not able to obtain the same, the hearing officer shall select and appoint either counsel or counsel-substitute for him as the hearing officer shall determine. The hearing officer shall have discretionary authority to refuse to permit any person to act as counsel-substitute if the hearing officer has good reason to believe such person's representation will obstruct or adversely affect the holding of a fair hearing.

E. Procedure

The inmate involved shall have the right (if represented, by his representative; if not represented, acting on his own behalf) to present relevant evidence and witnesses and the right to confront, question and cross-examine his accusers and any other witness.

F. Record of hearing

Effective August 1, 1972,[15] the hearing shall be recorded by such means as are selected by the Jail Board. A record of the same shall be preserved and be reasonably available to the inmate involved and with his consent to any person and with or without his consent, for use by any governmental official in accordance with law.

G. Authority of hearing officer

A hearing officer shall hear the evidence in cases brought before him, have the authority to limit evidence on the basis of relevancy and materiality, not be otherwise bound by the rules of evidence, determine the guilt or innocence of the inmate accused of an infraction of law or of the Jail Rules, find any such inmate guilty of such charge only upon the basis of clear and convincing evidence, and either affirm, modify, or reverse as he shall determine in his discretion, subject to the provisions of all applicable laws and Jail Rules, the action taken which is the subject of the hearing. In the exercise of such authority, the hearing officer, by way of illustration and not by way of limitation, may counsel, or warn, or reprimand the inmate involved, or order the inmate's relocation to another section in the Jail, or the loss by the inmate of one or more privileges for a specified time, or the placing of the inmate in isolation, segregated confinement, or lock-up, for a specified time, or any combination thereof. The hearing officer shall record his decision and the reasons for the same.

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[15] Future date needed to provide time to implement provision.

H. The severity of any determination by a hearing officer may not be increased by any official of the Jail; however, any such determination may be lightened, reduced, or suspended.

I. After a hearing has been held, the inmate involved shall not again be charged with an infraction growing out of the same factual occurrence which was the basis of such hearing.

J. Any inmate shall have the right to address and have promptly transmitted in a selaed envelope, a written communication to a hearing officer, including, *inter alia*, a request for a hearing. If the hearing officer determines that the inmate is entitled under the Jail Rules to a hearing, he shall hols such hearing as required by those Rules. If the hearing officer determines that the inmate is not so entitled to a hearing, he shall promptly advise the inmate and the Jail Board in writing to that effect.

APPENDIX C

AFFIDAVIT

District :
of : SS
Columbia :

Eugene N. Barkin, being duly sworn, deposes and says:

1. I am General Counsel of the United States Bureau of Prisons.

2. In 1965, I, along with Professor Paul Wilson of the University of Kansas, School of Law and Professor James Vorenberg, of the Harvard Law School, who was then Director of the Office of Criminal Justice of the United States Department of Justice, initiated the first law school legal assistance program for inmates in the United States. Since that date, our office helped initiate and has kept in contact with a number of other legal assistance programs for inmates.

3. To the best of my knowledge, there are at present, at least the following legal assistance programs in existence relating to federal institutions.

Institution	Program
United States Penitentiary Atlanta, Georgia	Emory University Law School[16]
United States Penitentiary Leavenworth, Kansas	University of Kansas School of Law

[16] I have recently been advised that Emory is closing in January, 1974.

Institution	Program
United States Penitentiary McNeil Island, Steilacoom Washington	Washington University School of Law
United States Penitentiary Terre Haute, Indiana	Indiana University School of Law
Federal Reformatory for Women Alderson, West Virginia	Washington & Lee Law School
Federal Reformatory El Reno, Oklahoma	University of Oklahoma
Federal Reformatory Petersburg, Virginia	William & Mary Law School
Federal Correctional Institu- tion Danbury, Connecticut	Yale University Law School
Federal Correctional Institu- tion Milan, Michigan	Michigan University Law School
Federal Correctional Institu- tion Sandstone, Minnesota	Minnesota University Law School
Federal Correctional Institu- tion Terminal Island, California	University of California, Loa Angeles Law School
Federal Correctional Institu- tion Texarkana, Texas	University of Arkansas Law School

4. Arrangements are being made for the initiation of a legal assistance program for a new federal institution in Oxford, Wisconsin, with the University of Wisconsin Law School.

5. In addition, the Bureau will be opening a new institution at Pleasanton, California, and is in the process of taking over the clinical center for narcotic addicts at Lexington, Kentucky. Contracts will be made with law schools in the area of San Francisco, to render legal assistance to inmates at Pleasanton, and with the University of Kentucky for those at Lexington, Kentucky. Further, preliminary contacts have been made with the University of West Virginia School of Law for legal assistance to the students at the Kennedy Youth Center, Morgantown, West Virginia.

6. The Bureau of Prisons has not limited the programs in rendering assistance to inmates with "corrections problems," *e.g.*, issues that may arise between inmate and the Bureau of Prisons, particular institutions, and the Board of Parole. Based on my own information concerning the programs and a telephone canvass of some of our institutions, it is my understanding that, with the apparent exception of three programs (Petersburg; Terminal Island;[17] and Texarkana), law school assistance programs do render assistance with regard to "corrections problems."

7. Appendix A to the article "Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process" by Jacob and Sharma, 18 Kansas Law Review 493, 625 (1970) indicated that only one of the then-existing programs was limited to post-conviction remedies, that at the University of Indiana-Bloomington. Even with regard to that program, information received by the Bureau subsequent to the Jacob and Sharma article states that, although most of the work at that program is in the area

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[17] At Terminal Island, it appears that some work in the area of corrections problems is handled by the Public Defender.

of post-conviction remedies, the program does not hesitate to respond to other matters such as administrative transfer of prisoners between federal institutions and a class action involving credit on sentence.

8. The Medical Center for Federal Prisoners at Springfield, Missouri, formerly had a program with the Law School of the University of Missouri at Kansas City. As of September 1971, legal assistance to prisioners has been rendered by the Office of the Federal Public Defender.

/s/ EUGENE N. BARKIN
Eugene N. Barkin, General
Counsel
Bureau of Prisons

Subscribed and sworn to before me this 20th day of December 1973.

/s/ EDMUND G. CHAMBERLAIN, JR.
Notary Public
Edmund G. Chamberlain, Jr.
Notary Public - District of Columbia
My Commission expires June 14, 1976